

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

75-7287 75-7363

To be argued by
LOUIS L. STANTON, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7363

UNITED BANK LIMITED,

Plaintiff-Appellant,
—against—

COSMIC INTERNATIONAL, INC.,

Defendant-Appellee.

[One of consolidated appeals Nos. 75-7287, 75-7320,
75-7325 and 75-7363.]

APPEAL OF THE DISTRICT COURT'S JUDGMENT

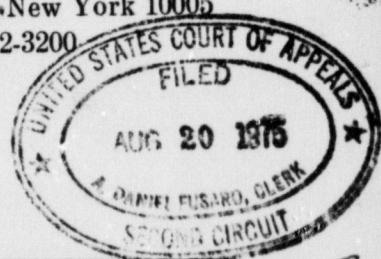
REPLY BRIEF OF PLAINTIFF-APPELLANT
UNITED BANK LIMITED

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August 20 1975



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**REPLY BRIEF OF PLAINTIFF-APPELLANT
UNITED BANK LIMITED**

ARGUMENT

I.

Cosmic's contention that, despite the fact that CPLR Section 5001 mandates pre-judgment interest from the earliest ascertainable date the cause of action existed, federal district courts may exercise discretion in awarding pre-judgment interest in actions in the nature of interpleader is not supported by the authorities cited.

In support of its contention that district courts have discretion in awarding interest in actions in the nature of

interpleader despite the non-discretionary language of CPLR Section 5001, Cosmic cites two cases (Cosmic's Brief, p. 2) in which conflicting claims were made to the proceeds of an insurance policy and the claimants argued that the insurance company should be required to pay interest on the disputed fund as a condition of discharge. In one case (where there was a 5-month delay between the insured's death and the deposit of the fund into court) the court denied interest, and in the other (where there was a 4½-year delay—for which the insurance company was responsible—between the insured's death and the commencement of legal proceedings by the insurance company) the court allowed interest. Cosmic attempts to explain each decision on the theory that the court was exercising its discretion in an interpleader action. The better explanation is that despite their dicta quoted by Cosmic (Br. 2), both courts in fact applied the special rule that interest is never payable on insurance benefits unless there has been culpable delay by the insurance company in paying the benefits:

“[I]nterest is not ordinarily payable on insurance benefits and . . . the insurance companies, in calculating their premiums, take into account the fact that the benefits will always be payable at a date more or less later than the actual accrual of liability. Cases of long custody of the fund like this make up for the cases where payment is made within twenty-four hours. If one were to say that the postponement of payment here was so excessive as to entitle the beneficiaries to the interest earned, one would have to say that at some point interest would cease to be part of the contemplated earnings of the insurance company and become a windfall. That, however, is contrary to my hypothesis that every nonculpable delay is within the contemplation of the insurance company in establishing its premium rates.

"It may well be that grossly culpable delay should subject the insurance companies to liability for interest at the legal rate and that less culpable delay should subject them to liability for interest at the rate earned by the fund but unless the delay is culpable there is no liability for interest of any kind." *Aetna Life Ins. Co. v. du Roure*, 123 F.Supp. 736, 740-41 (S.D.N.Y. 1954).

See also, *John Hancock Mut. Life Ins. Co. v. Doran*, 138 F. Supp. 47, 49-50 (S.D.N.Y. 1956) (Kaufman, J.).

II.

This is not an action "of an equitable nature".

Although Judge Brieant properly characterized the whole of the litigation before him as being "in the nature of an interpleader action" (a shorthand description we adopted in our brief), no order of interpleader in this or the consolidated case was ever obtained by Cosmic. Irving Trust Company obtained such an order with respect to the Trust Receipts it held; these Trust Receipts were deposited in court; and Irving played no further part in these cases. The funds held by Cosmic, on the other hand, remained under attachments which the plaintiffs had obtained when they started their actions. It is doubtful whether Cosmic was at any time the type of disinterested stakeholder who could seek treatment of "an equitable nature", for it had earlier withheld payment of these amounts it owed, as security for the arrival of documents of title to other unrelated goods. (The relevant portion of the testimony to that effect of Cosmic's president is reproduced as an exhibit hereto.)

~~CONFIDENTIAL~~

We must think the following. That the General
must be satisfied with the work of General
and the General is right.

That the Army does think
about the work

Respectfully submitted,

Major General J. M. Morris
Major General J. M. Morris
General John Morris

General John Morris
General John Morris
General John Morris

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Exhibit

Excerpt from the deposition transcript dated June 12, 1973 (p. 315, line 3 to p. 317, line 21) of Mr. S.D. Korn, Fomic's president, reflecting the questioning of Mr. Korn concerning a note dated January 26 1972 sent by him to Amin Jau: Mills, Ltd., Rawalpindi, Pakistan, which set forth certain conditions to be met before Fomic would make payment under the aforesaid Trade Receipt:

Q. Well then, what is the second condition mentioned in your January 26th note or today?

A. Yes.

Q. When you say you also...secondly, that all your outstanding contracts and agreements with Amin Jau: Mills would be honored?

A. Yes, sir.

Q. What does that mean? What outstanding contracts and agreements did you have?

A. There were some goods which were not yet shipped. We did not know whether they would be shipped or not, but eventually they were shipped and the documents were presented to us, and we paid for them.

Q. And if they had not been shipped, you would not have made those future payments?

A. That we would have decided at that time.

Q. I see. And then what is the reference to arbitration in New York?

A. Yes, that is the same, you know, that those goods...if those outstanding goods are not delivered, we will take the case to the arbitration here.

Q. I see. Now, of course, all of the shipments for which those payments were due had already been received and paid to others by January, so this would

Exhibit

future shipments to be received from Amin; correct?

A. There were some goods that were already shipped, but we never received the documents because of the war.

Q. Yes.

A. So we did not know where the documents were.

Q. I see.

A. We had given the bank guarantee here for those documents because we provided the bank guarantee, and took the goods, because the goods arrived and the documents never arrived. Then those documents—because if we did not receive the documents, we had to provide our bank guarantee, which we provided to the steamship company to pay for those documents, and then they came.

I don't know when they came. They came against cash payment and we paid it, through the Isthmian Company.

Q. In your cable, you are talking about payment for goods which had been received in August and sold in August, and the payments were not due yet, and you were not going to make those payments until the goods which were being received had proper documentation and was assortet out and there was no arbitration required about them, and it all turned out all right; isn't that so?

A. This has nothing to do with the August payment. It has nothing to do with the August payment.

Q. This cable has nothing to do with the August payment?

A. This sentence is what you are relating to, this last sentence, we told them these are the goods we have also not yet— we know they are shipped, but

Exhibit

we never received the documents. So tomorrow we do not want a double claim against us because we have taken a bank guarantee from the bank, and gave that bank guarantee to the steamship company.

Q. But, Mr. Keen, these payments refer to outstanding bills?

A. Yes.

Q. It said before we can make payment of outstanding bills to any party?

A. Yes.

Q. Doesn't that cover the outstanding bills from the August shipment?

A. These cover all.

Q. All?

A. Yes.

Q. Including the August ones?

A. Yes.

Q. And you are saying that before that can be paid the matter of the shipments has to be straightened out satisfactorily?

A. Sir, on the 28th of January, there was no payment due. We were talking only on the future payments. Even August money was not due. August goods would stay shipped not due yet.

The 28th of January we did not owe them any money. We were always talking about the future.

Q. On February 8th, the first payment became due?

A. I sent this cable on January 28th.

Q. And you were referring, among other things, to the payments due on February 8th?

A. I told them the first payment due was on February 8th.

Exhibit

Q. And you were saying we cannot make the February 8th payment until we are sure that the outstanding contracts are [honored]?

A. That we have this particular shipment in dispute.

Q. Which shipment was in dispute?

A. The shipment which we never received the documents for, and we had received the goods.

Q. And when did the goods arrive?

A. The goods arrived, I think, in January or February some time.

Q. And those are goods which are not involved under the trust receipts in this case?

A. Yes."

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Date 1/25/44

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